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No. 00-104

Supreme Court, U.S.
FILED
AUG 29 2000
CLERK

In the Supreme Court of the United States

CUSTOM FOOD MACHINERY, INC. and RON MCNIEL, SR.,

Petitioners,

v.

MARIA TERESA DE SARACHO, EUREKA CANNERS GROUP, S.A. and EUREKA MEXICANA, S.A.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Plaintiffs fail to address the question presented. The issue is not, as plaintiffs posit, "whether the court or the expert has the final word on what has been 'reasonably relied upon'" for purposes of admitting opinion testimony under the Federal Rules of Evidence. Opp. at 11. Rather, it is whether in evaluating a Rule 703 challenge to the unreliability of opinion testimony, district courts need to consider whether the underlying facts, data and information supporting the opinion are sufficiently trustworthy to make the expert's reliance on them reasonable in the particular case. Plaintiffs do not dispute that this question has broad practical implications in virtually every trial conducted in federal courts. Plaintiffs likewise concede that the circuits have split on this question.[1] Plaintiffs nevertheless claim that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), has healed the split of authority in the circuits.

In fact, the conflict has not vanished. Contrary to plaintiffs' reading of the cases, post-*Daubert* decisions of both the Ninth and Sixth Circuits continue to follow the "liberal" approach to Rule 703. Plaintiffs do not dispute that the Second, Third, Fifth, Seventh, Tenth, and Eleventh Circuits apply the more rigorous "restrictive" approach. Hence, certiorari should be

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[1] *See, e.g., In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223, 1243-44 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987). *See generally* 2 M. H. Graham, *Handbook of Federal Evidence*, § 703.1, p. 105 & n.14 (4th ed. 1996); 3 Mueller & Kirkpatrick, *Federal Evidence* § 357 (2d ed. 1994); Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C. L. Rev. 53 (1994); Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 Mercer L. Rev. 447 (1996).

granted to permit this Court to resolve the conflict and adopt the restrictive approach to Rule 703, which requires district courts to evaluate the reasonableness and reliability of the data on which expert testimony is based.

Application of the proper standard here mandates reversal of the windfall judgment awarded to plaintiffs. Petitioners properly preserved the issue for review, and the mere fact that the loan documents underlying the expert's opinion were admitted in evidence does not dispose of petitioners' challenge to the testimony. Under Rule 703, the pertinent inquiry is not the admissibility of the data supporting the expert's opinion but their reliability. The assumptions of plaintiffs' expert as to the interest rates applicable to the BanRural loans were inconsistent with the bank's actual practices. This is confirmed not only by petitioners' post-trial submissions but also by the evidence admitted at trial. Hence, these underlying data lacked the requisite guarantees of trustworthiness to support admission of the opinion, and the district court's error in refusing to exclude it has produced a miscarriage of justice.

A. The Circuits Are in Conflict.

Notwithstanding *Daubert*, both the Ninth Circuit and the Sixth Circuit continue to follow the erroneous liberal approach to Rule 703. Plaintiffs do not dispute that the restrictive approach is proper and acknowledge that the pre-*Daubert* decisions of the Sixth Circuit are in the liberal camp.[2] Plaintiffs appear to suggest, however, that post-*Daubert*, there is no evidence that either the Sixth or the Ninth Circuit would apply the liberal approach. This suggestion is at odds with the recent reported decisions of both courts cited in the petition.

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[2] *E.g., Manniano v. Int'l Mfg.*, 650 F.2d 846, 853 (6th Cir. 1981).

In discussing the Sixth Circuit jurisprudence, plaintiffs conveniently ignore *Trepel v. Roadway Express*, 194 F.3d 708 (6th Cir. 1999), which was cited in the petition. Pet. at 10. Plaintiffs represent to the Court that "the pre-*Daubert* split will be completely healed once the Sixth Circuit has had an opportunity to address the question [presented for review in this case] with *Daubert* as guidance." Opp. at 10-11. Some six years after *Daubert*, however, the Sixth Circuit had such an opportunity in *Trepel*, but continued to adhere to the liberal view of Rule 703.

In *Trepel*, the plaintiff sued for damages based on a negligence theory after a valuable African woodcarving was broken in transport. Plaintiff's expert testified in part based on hearsay phone conversations plaintiff had with a woman who owned a similar carving and had said she had been offered $2.5 million for hers and would sell it only for $3 million. The Sixth Circuit invoked its prior decision in *Manniano* and held that the proffered opinion testimony was admissible because it was based on the type of information on which experts in the field customarily relied. 194 F.3d at 716-17. The dissenting opinion, however, would have required more: that the information be sufficiently trustworthy to make such reliance reasonable in the particular case. *Id.* at 719 (Suhrheinrich, J., dissenting in part). According to the dissent, the hearsay statements were unreliable and untrustworthy, which made it unreasonable for the expert to rely on these statements under Rule 703. *Id.* at 719-22. Thus, contrary to plaintiffs' analysis, *Daubert* has not affected the Sixth Circuit's approach to the issue presented for review in this case.

Likewise, plaintiffs distort the Ninth Circuit's jurisprudence. The Ninth Circuit has not adopted the restrictive approach and remains, along with the Sixth Circuit, in the liberal camp. The decision below speaks for itself: the Ninth Circuit approved of admission of the opinion testimony on the basis that "[i]t is common

sense that certified public accountants reasonably rely on loan agreements to calculate the interest due on loans." App. 8a. Thus, according to the Ninth Circuit, the district court below had no obligation to determine whether the expert's reliance on the loan agreements was reasonable under the circumstances of this case.[3]

Moreover, it is not the case, as plaintiffs claim, that the decision in *McKendall v. Crown Control Corp.*, 122 F.3d 803 (9th Cir. 1997), "indicates that the 'restrictive' approach has gained acceptance" in the Ninth Circuit. Opp. at 10. *McKendall* is not a Rule 703 case and does not even mention Rule 703. Thus, it is erroneous for plaintiffs to insinuate that the citation of *McKendall* in a dissenting opinion in *Sementilli v. Trinidad Corp.*, 155 F.3d 1130 (9th Cir. 1998), somehow can be equated with acceptance by the Ninth Circuit of one of the two competing Rule 703 standards.[4]

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[3] Plaintiffs place heavy reliance (*see* Opp. at 3, 6, 13-14) on the district court's statement that "in this instance, I have no difficulty feeling that these loan documents have some index of reliability for what they purport to be." App. 19a. It is difficult to understand how this observation by the trial judge affects the Rule 703 analysis. The court's statement appears to be related to the question of authenticity—a Rule 901 matter—rather than the reliability of the expert's interpretation of the loan documents as being consistent with BanRural's conduct. The latter, rather than the former, is the issue presented by the Rule 703 challenge to admission of the expert's opinion.

[4] In *Sementilli*, the Ninth Circuit reversed an order granting summary judgment based on the district court's refusal to consider opinion testimony proffered in opposition to the motion that the trial judge determined to be "pure speculation" and unreliable. 155 F.3d at 1133. The dissent in *Sementilli* (*id.* at 1141 (B. Fletcher, J., dissenting)) quoted a footnote in *McKendall* addressing the "conflicting pronouncements" regarding *Daubert* and its application to all expert testimony. *See McKendall*, 122 F.3d at 806 n.1. This citation, however, does not undermine petitioners' argument

(footnote continued)

In short, *Daubert* provides guidance but is not controlling. Unless this Court grants certiorari, the Ninth and Sixth Circuits will continue to be free to follow the erroneous liberal approach to admissibility under Rule 703.

B. The Rule 703 Analysis Does Not Turn on Whether the Underlying Facts, Data and Opinions Have Been Admitted.

Plaintiffs are correct that one of the purposes of Rule 703 is to liberalize common law practice and permit experts to rely on hearsay or otherwise inadmissible sources, provided guarantees of trustworthiness and reliability are maintained. Rule 703 is not by its terms, however, limited to consideration of the types of inadmissible matters that may support an otherwise admissible expert opinion. Moreover, the simplistic paradigm that plaintiffs seek to construct—that Rule 703 has no application if the expert claims to rely for an opinion on matters that have been admitted in evidence—turns the law on its head: reliability, not technical admission of evidence, remains the foundation of Rule 703 analysis.

The fact that certain materials have been admitted into evidence does not insulate them from the rigors of Rule 703. *See Bauman v. Centex Corp.*, 611 F.2d 1115, 1120 (5th Cir. 1980) ("In general whether facts relied on by an expert are in evidence, or even could be in evidence, is not relevant. The pertinent inquiry under Rule 703 is whether the facts are of a type reasonably relied on by experts in the particular field. The object of this inquiry is of course to determine the reliability of the expert's testimony."). The question whether

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that the restrictive approach has only been espoused in dissenting opinions in the Ninth Circuit, much less does it support plaintiffs' claim that the Ninth Circuit is no longer in Rule 703's liberal camp.

evidence has been "reasonably relied upon" requires a judge to determine whether the evidence relied on is the type customarily relied on and then whether those materials are reliable in fact. The admission of the underlying data is relevant to this inquiry. It is not a substitute, however, for the exercise of the district court's gatekeeping function through application of the restrictive approach to assess the reliability of the proffered opinion testimony under Rule 703.

C. Petitioners Have Preserved the Issue for Review.

The Ninth Circuit had adequate opportunity to consider and decide the legal issue as to which petitioners seek review in this Court. Petitioners briefed and argued the issue of the lack of reliability of the foundation for the expert opinion in the Ninth Circuit. *See* App. at 7a-8a. That suffices to preserve the issue: petitioners are not required to brief the circuit conflict below to preserve the issue for certiorari.

Moreover, in any event, the issue was again briefed, with citation to *Daubert,* in petitioners' petition for rehearing. Pet. for Reh. at 5 & n.2. Raising an issue in a petition for rehearing preserves the issue for further appellate review. *See Richards v. Jefferson County*, 517 U.S. 793, 797 n.3 (1996) ("Because petitioners raised their due process challenge to the application of res judicata in their application for rehearing to the Alabama Supreme Court, that federal issue has been preserved for our review.").

Likewise, the reliability of the evidence relied on by plaintiffs' expert was properly objected to at trial. Federal Rule of Civil Procedure 46 requires only that the court be put "on notice." *See* 9 *Moore's Federal Practice Guide*, § 46.02[3] (3d ed. 2000). "The Supreme Court has ruled that a plaintiff preserves his objection if counsel puts the trial court on notice as to his concerns, even though counsel might have been more articulate when stating the grounds for objection."

Id. Counsel for petitioners drew the trial court's attention to the unreliability of the evidence used as the basis for the expert's opinion. App. 17a.

Thus, petitioners timely challenged the erroneous, unfounded and highly prejudicial opinion testimony at every stage of this case. Plaintiffs' arguments to the contrary are mere wishful thinking.

D. Plaintiffs Misstate the Record.

Plaintiffs attempt to persuade this Court that it should not be disturbed by the grievous error upon which the judgment below rests and the resulting $6 million windfall. However, plaintiffs' efforts in this regard are based on a pervasive misrepresentation of the record. Most disturbing are plaintiffs' claims that the evidentiary basis for challenge to the erroneous expert opinion did not exist until after the trial (*see* Opp. at 2-5, 7) and that the $12.5 million judgment represented a "compromise verdict." *See* Opp. at 1-2.

The inadmissibility of the expert's testimony does not depend on the showing made in petitioners' post-judgment motion under Rule 60(b)(3). As explained in the petition, the trial record itself reflects the dramatic inconsistency between BanRural's actual practices in assessing loan interest and plaintiffs' expert's skewed assumptions as to what the bank supposedly was doing. *See* Pet. at 5. Plaintiffs offer no satisfactory explanation for this transparent conflict.[5]

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[5] In a footnote, plaintiffs attempt to deal with this through obfuscation. First, according to plaintiffs, "the interest rate the bank utilized in the period immediately *before* the peso's slide accelerated in early 1995, differs from the rate the accountant used for the time periods *after* the peso plummeted." Opp. at 3-4 n.5 (original emphasis). The problem is that the record below is uncontradicted that the devaluation of the peso occurred in late December 1994 (RT 1702) and devaluation cannot in any event explain why plaintiffs' expert concluded that the bank would have charged

(footnote continued)

In any event, plaintiffs' attempt to debase the evidence offered in support of petitioners' Rule 60(b)(3) motion is groundless. Plaintiffs represent to this Court that petitioners' evidence was mere "hearsay . . . indicating that the Mexican bank might be willing to apply a lower interest rate" and that "[a]lthough they had the opportunity to do so, [petitioners] declined . . . to authenticate the evidence they had regarding the Mexican bank's position." Opp. at 3.

None of this is true. Petitioners propounded post-trial letters rogatory to the bank (ER 381) and presented BanRural's response to the letters in support of the Rule 60(b)(3) motion. ER 416, 483. Petitioners also submitted an affidavit by the responsible bank officer attesting that, as of six months after trial, the amount of the debt was less than $5.5 million. ER 1242-46. Thus, the Rule 60(b)(3) showing, which was uncontroverted on this point, left no doubt as to the actual amount due on the bank's loans.

Plaintiffs try to avoid the implication of this evidence by claiming that the jury's catastrophic $12.5 million award was simply a "compromise verdict." This too is false. It is true that plaintiffs originally claimed damages totaling in excess of $25 million. By the end of trial, however, plaintiffs had

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interest at an annual rate in excess of 90% on April 8, 1995 when the bank's own records reflected that on April 7 interest was accruing on the loans at rates ranging from 13.5% to 23.7%.

Next, plaintiffs urge that their accountant checked his calculations and testified that they were consistent with BanRural's own calculations. Opp. at 3-4 n.5. If, as he testified, however, the accountant "checked" his "methodology" with the bank statements, such a check would have revealed that his interest assumptions were inaccurate, and the drop in the exchange rate for the Mexican peso cannot explain the discrepancy.

reduced their demand and requested in closing argument that the jury award them $15.7 million. Of that amount, $11.4 million supposedly represented plaintiffs' alleged liability to BanRural, and $4.3 million reflected lost profits and other damages. RT 3275-79. Thus, despite all of plaintiffs' denials, the jury's $12,516,000 verdict against petitioners (App. 14a-15a.) necessarily was based on their expert's testimony concerning the BanRural loans.

For these reasons, the record leaves no doubt that the award represents a $6 million windfall to plaintiffs. Accordingly, certiorari should be granted so that this Court may resolve the split of authority and, in so doing, debunk the liberal approach to Rule 703 that produced this irrational and unconscionable result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 2000